



Office of the Attorney General

Douglas B. Moylan

Attorney General of Guam

Solicitor's Division

Guam Judicial Center, Suite 2-200E

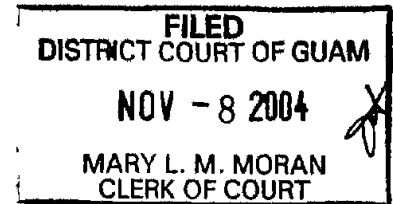
120 West O'Brien Drive

Hagåtña, Guam 96910 • USA

(671) 475-3324 • (671) 472-2493 (Fax)

www.guamattorneygeneral.com • law@mail.justice.gov.gu

Attorneys for Respondents



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**IN THE DISTRICT COURT OF GUAM
HAGÁTÑA, GUAM**

JULIE BABAUTA SANTOS, individually
and on behalf of all those similarly situated,

Petitioner,

vs.

FELIX P. CAMACHO, Governor of Guam;
ART ILAGAN, Director of Department of
Revenue and Taxation; LOURDES M.
PEREZ, Director of Department of
Administration; DOUGLAS B. MOYLAN,
Attorney General of Guam; and
GOVERNMENT OF GUAM,

Respondents.

Civil Case No. 04-00006

**MEMORANDUM OF POINTS AND
AUTHORITIES IN RESPONSE TO
PETITIONER'S MOTION FOR ORDERS
APPROVING ADMINISTRATION PLAN,
ETC.**

Respondents submit the following Memorandum of Points and Authorities in response to the Petitioner's Motion for Orders approving the Administration Plan and Amended Notice and for Orders establishing the Fairness Hearing Date and Objection and Opt Out Date, and vacating the April 30, 2004 Scheduling Order.

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ORIGINAL

1 **Factual Background.**

2 On June 14, 2004, the parties entered into a Settlement Agreement to resolve this case. The
3 Settlement Agreement was signed on behalf of the Petitioner by herself and her attorney of record.
4 The Settlement Agreement was signed on behalf of the Respondents by the Acting Governor of
5 Guam, the Acting Director of the Department of Administration, the Director of the Department of
6 Revenue and Taxation, and the Attorney General of Guam, and was approved as to legality and
7 form by the Deputy Attorney General of Guam.
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9 The Settlement Agreement was preliminarily approved by Magistrate Judge Joaquin V.E.
10 Manibusan on June 17, 2004.

11 Section V of the Settlement Agreement directs the parties to enter into an Administration
12 Plan, which Plan shall cover at a minimum the points set forth in said Section V. The Petitioner's
13 motion seeks the Court's approval of this Plan and certain other relief. This issues raised in this
14 Memorandum of Points and Authorities relate to the proposed Administration Plan and not to the
15 other relief sought by Petitioner, which other relief is not opposed.
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1 **Discussion.**

2 **Need for Legislative Appropriation.**

3 The proposed Administration Plan in Section III, on pages 5 & 6, provides that the total
4 amount of estimated expenses to administer the EIC Settlement Fund is \$975,389, and states that
5 "All such costs shall be the responsibility of the Government of Guam." However, Section III does
6 not stipulate that the expenditure of these funds by the Department of Revenue and Taxation shall
7 be in accordance with an appropriation passed by the Guam Legislature. The Director of the
8 Department of Revenue and Taxation is concerned that were he to expend government funds for
9 this purpose without the Legislature first appropriating the same to the Department of Revenue and
10 Taxation, he could be found to be in violation of 5 G.C.A. §22401 and be subjected to disciplinary
11 action, including removal from office, and be convicted of a misdemeanor. The Organic Act of
12 Guam and the laws of Guam provide that funds for this purpose must be appropriated by the Guam
13 Legislature. 48 U.S.C. §1423j; 5 G.C.A. §22401. Thus, language should be inserted into Section V
14 of the proposed Administration Plan stating that the expenditure of such funds shall be subject to
15 their being appropriated by the Legislature.¹
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19 **Custodian of EIC Settlement Fund must be Changed.**

20 The proposed Administration Plan in Section II (B), on page 3, establishes a Settlement
21 Fund into which shall be paid the \$60 million for delinquent EIC refunds referred to in Section II
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23 ¹ The Department of Revenue and Taxation estimates that \$100,000 and not \$75,000 as provided in the proposed
24 Administration Agreement will be needed for postage without regard to the 10 year period, increasing total
25 expenses to \$1,000,389.

1 (A). Section II (B) states that "The custodian of the EIC Settlement Fund shall be the Director of
2 Revenue and Taxation". However, the Department of Administration and not the Department of
3 Revenue and Taxation has the power to take charge of the EIC Settlement Fund because the
4 Department of Administration is charged with the responsibility of managing and accounting for all
5 of the various funds of the Government of Guam and is responsible for disbursing monies owed by
6 the government of Guam. 5 G.C.A. §20106, §21110, §21111, §21113, §22101 - §22110, §22201 -
7 §22205, §50102, §50104, & §50107. Thus, the proposed Administration Plan should be revised to
8 make the Director of the Department of Administration as the custodian of the EIC Settlement
9 Fund.
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11 **Compliance with Income Tax Refund Offset Program Required.**

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13 Section I (G), page 11 of the proposed Administration Plan, provides that "Unless otherwise
14 prohibited by applicable law, if any EIC Class Member has an outstanding tax liability prior to the
15 payment of any Claim made by such a Member pursuant to the Settlement Agreement and this
16 Administration Plan, then such Claim or Claims shall be reduced by the amount of the applicable
17 tax liability." However, no provision is made for administration of the income tax refund offset
18 program under Section 6402 of the Internal Revenue Code, whereby refunds owed by the
19 Government to taxpayers are to be reduced by past due child support and amounts owed to
20 Government agencies. See: Sorenson v. Secretary of Treasury, 475 U.S. 851, 106 S.Ct. 1600, 89
21 L.Ed. 2d 855 (1986) (holding that refundable earned income tax credits are subject to the income
22 tax refund offset program the same as ordinary income tax refunds). The Department of Revenue
23 and Taxation has entered into agreements with the Guam Memorial Hospital Authority, the Child
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1 Support Collection Division of the Attorney General's Office and the Guam Housing and Urban
2 Renewal Authority for this purpose. The proposed Administration Agreement should expressly
3 take this program into account, and state that the order of the offsets shall be as follows: (1)
4 Accounts receivable, Department of Revenue and Taxation, (2) Child support; (3) Guam Memorial
5 Hospital Authority, and (4) GHURA.

6 7 8 **Revision of Second Notice Requirement.**

9 Page 8, lines 1 – 6 of the proposed Administration Plan, states as follows:

10 Within fifteen (15) days after the Effective Date of the Settlement, as
11 defined in the Settlement Agreement, a **Notice** (identified as the "Second
12 Notice" under the Settlement Agreement) including instructions and
13 procedures to complete and file the Claim Form will be mailed along with
14 the Claim Form to each potential EIC Class Member.

15 Due to the voluminous amount of materials and cost of postage, the Department of Revenue
16 and Taxation requests that the above language be revised to state as follows:

17 Within fifteen (15) days after the Effective Date of the
18 Settlement, as defined in the Settlement Agreement, a **Notice**
19 (identified as the "Second Notice" under the Settlement Agreement)
20 together with the procedure of how to obtain instructions and forms
21 will be mailed to each potential EIC Class Member.

22 **Concerns of Governor of Guam.**

23 Finally, the undersigned Attorney General discloses to the Court that although the
24 Settlement Agreement was signed by the Acting Governor, the Governor now appears to be
25 having second thoughts about various aspects of the Agreement, and has recently purported to
"instruct" the undersigned Attorney General to file no pleadings on his behalf without his

1 permission as "client." Based upon the nature of this Constitutional office, the Governor is
2 without authority to "instruct" the Attorney General with respect to litigation on behalf of the
3 Government of Guam. By federal law, in the Organic Act of Guam, 48 U.S.C. § 1421g(d)(1),
4 the Attorney General of Guam is designated as the "Chief Legal Officer for the Government of
5 Guam." As such, the position of Attorney General controls all litigation by and on behalf of the
6 Government of Guam, its departments, boards, agencies and instrumentalities. "The Organic
7 Act makes the Attorney General the Chief Legal Officer of the government of Guam. The
8 Governor is head of the executive branch, but *the Attorney General is the chief legal officer of*
9 *the government of Guam, which includes not only the executive branch, but also the legislative*
10 *and judicial branches. Thus, the sphere of the Attorney General's legal cognizance is within the*
11 *entire government of Guam, legislative and judicial, not just the executive branch."* *Moylan v.*
12 *Camacho*, Superior Court of Guam, Special Proceeding Case No. SP230-03, "Decision and
13 Order," dated November 10, 2003, p. 38 (Manibusan, J.) (emphasis in bold added).
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15 Even before Judge Manibusan's Decision and Order in *Moylan v. Camacho*, and prior to
16 inclusion in the Organic Act by Congress in 1998 of the term "Chief Legal Officer," the
17 Legislature of Guam recognized that it is the Attorney General who controls litigation on behalf
18 of the Government of Guam. "Notwithstanding any other provision of law, *the Attorney General*
19 *shall have cognizance of all legal matters... involving the Executive Branch of the government of*
20 *Guam*, its agencies, instrumentalities, public corporations, autono-mous agencies and the Mayors
21 Council, all hereinafter referred to as 'agency.'" 5 G.C.A. § 30102 (emphasis added). *See also*, 5
22 G.C.A. § 30109 (the Attorney General shall "[c]onduct on behalf of the government of Guam all
23 civil actions in which the government is an interested party"). Furthermore, 5 G.C.A. § 30103
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1 provides the "Attorney General shall have, in addition to the powers expressly conferred upon
2 him by this Chapter, *those common law powers which include, but are not limited to*, the right to
3 bring suit to challenge laws which he believes to be unconstitutional...." (Emphasis added.)

4 Because the "real client" of the Attorney General is the people, the Attorney General is
5 generally "not constrained by the parameters of the traditional attorney-client relationship."
6 *Terry v Wilder*, 29 Va. Cir. 418, 431 (1992) (quoting *Feeney v Commonwealth*, 366 N.E.2d
7 1262, 1266 (Mass. 1977)), *rev'd on other grounds*, 247 Va. 119, 439 S.E.2d 398 (Va. 1994).
8 Unlike private attorneys, whose conduct in litigation may be subject to the whims of many
9 clients, the position of Attorney General – who represents the Government of Guam and all its
10 agencies and instrumentalities – answers to one client only: the people. The Attorney General is
11 not subject to the direction of the particular officials named as defendants in the litigation.
12 Instead, the views of the Attorney General prevail when a conflict arises between the views of
13 the Attorney General and those of the agencies and officers whom the attorney general
14 represents. *Battle v Anderson*, 708 F.2d 1523, 1529 (10th Cir. 1983) (holding that the views of
15 the Oklahoma Attorney General in litigation "must prevail" over the views of the legal counsel
16 for any particular state defendant); *Prisco v State of New York*, 804 F.Supp. 518, 520 (S.D.N.Y.
17 1992) (holding that Attorney General is authorized to represent individual state officers who are
18 sued in their official capacities, despite claimed conflicts of interest).

19 While the Attorney General is obligated to represent government officials and agencies to
20 the best of his abilities, he need not – indeed, must not – do so at the expense of the people as a
21 whole. *Connecticut Comm'n of Spec. Revenue v Connecticut Freedom of Information Comm'n*,
22 387 A.2d 533, 538 (Conn. 1978) (Attorney General's real client is the people); *Reiter v*
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1 *Wallgren*, 184 P.2d 571, 575 (Wash. 1947) (while Attorney General may represent state officers,
2 “it still remains his paramount duty to protect the interests of the people of the state”);
3 *Commonwealth ex rel. Hancock v Paxton*, 516 S.W.2d 865, 867 (Ky. 1974) (Attorney General
4 represents people, not “machinery” of state government). To do so “would be an abdication of
5 official responsibility.” *Feeney v Commonwealth*, 366 N.E.2d 1262, 1266 (Mass. 1977) (quoting
6 *Secretary of Administration and Fin. v Attorney Gen.*, 326 N.E.2d 334, 338 (Mass. 1975). *See*
7 *also Slezak v Ousdigian*, 110 N.W.2d 1, 5 (1961) (Attorney General must do more than espouse
8 individual views of state officials represented); *Ex parte Weaver*, 570 So. 2d 675, 684 (Ala.
9 1990) (upholding Attorney General’s authority to dismiss state insurance department
10 proceedings over objection of state insurance commissioner); *State ex rel. Derryberry v Kerr-*
11 *McGee Corp.*, 516 P.2d 813, 821 (Okla. 1973) (upholding authority of Attorney General to settle
12 pending litigation). And that is precisely the reason why this Office has taken the position he has
13 on behalf of the Government of Guam defendants in the Proposition A and EITC litigation.
14 Whether the Governor’s Office or any named defendant likes it or not, by law in the Organic
15 Act, by statute and the common law, the position Attorney General controls legal policy and
16 litigation decisions for the Government of Guam, its officers, agencies and instrumentalities.
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18 Taken to its logical conclusion, if every government official were permitted to express
19 their legal position in court, not only would the Government of Guam not have a coherent
20 uniform legal policy, but the Government of Guam (People) would be subject to court criticism
21 and potential sanctions for maintaining conflicting legal positions. In essence, the Government
22 of Guam would have a incoherent legal policy, and litigation would abound by each government
23 official maintaining a disjointed legal position.
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1 The position of Attorney General has the exclusive and absolute discretion to set legal
2 policy and to control all aspects of litigation for and against the Territory. *See Ex parte Weaver*,
3 570 So.2d 675, 677 (Ala. 1990) (“As the state’s chief legal officer, ‘the attorney general has
4 power, both under common law and by statute to make any disposition of the state’s litigation
5 that he deems for its best interest. ... He may abandon, discontinue, dismiss, or compromise it’”)
6 (emphasis added); *Feeney v. Commonwealth*, 366 N.E. 2d 1262, 1267 (Mass. 1977) upholding
7 authority of Attorney General to prosecute appeal in the U.S. Supreme Court over express
8 objections of state officials); *Slezak v. Ousdigian*, 110 N.W.2d 1, 5 (Minn. 1961) (stating that
9 “the courts will not control the discretionary power of the attorney general in conducting
10 litigation for the state”); *State ex rel. Igoe v. Bradford*, 611 S.W.2d 343, 347 (Mo. Ct. App.
11 1980) (“It is for the attorney general to decide where and how to litigate these issues involving
12 public rights and duties and to prevent injury to the public welfare”); *Public Defender Agency v.*
13 *Superior Court*, 534 P.2d 947, 950 (Alaska 1975) (Attorney General possesses “power to make
14 any disposition of the state’s litigation which he thinks best”); *State ex rel. Board of*
15 *Transportation v. Fremont, E. & M.V.R. Co.*, 35 N.W. 118, 120 (Neb. 1887) (recognizing that
16 Attorney General controls litigation and other state officials “cannot control his actions”); *Perillo*
17 *v. Dreher*, 314 A.2d 74, 79 (N.J. Super. Ct. App. Div. 1974) (recognizing that Attorney General
18 has “the exclusive power to control all litigation to which the State is a party”); *Opinion of the*
19 *Justices*, 373 A.2d 647, 649 (N.H. 1977) (Attorney General has “broad authority to manage the
20 state’s litigation and to make any disposition of a case which he deems is in the state’s best
21 interest”); *Michigan State Chiropractic Ass’n v. Kelley*, 262 N.W.2d 676, 677 (Mich. App. 1977)
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1 (Attorney General "has statutory and common law authority to act on behalf of the people of the
2 State of Michigan in any cause or matter, such authority being liberally construed").
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4 **Conclusion.**

5 Based upon the foregoing reasons, the Court should direct that the proposed Administration
6 Plan be revised in accordance with the points raised above.
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8 Respectfully submitted this 8th day of November, 2004.

9 **OFFICE OF THE ATTORNEY GENERAL**
10 **DOUGLAS B. MOYLAN, Attorney General of Guam**

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12 **Douglas B. Moylan**